4-12-2007

Waterbottom Issues - II. Public Use

Patrick G. Tracy Jr.

3. Waterbottom Issues – II. Public Use

Patrick G. Tracy, Jr.
Attorney at Law, Lafayette, Louisiana

"Things which are common are those whose property belongs to nobody, and which all men may freely use, conformably to the use for which nature has intended them, such are air, running water, the sea and its shores. From the public use of sea shores, it follows that every one has a right to build there a cabin, to retire to, and likewise to land there, either to fish or to shelter themselves from the storm, to moor ships, to dry nets, and the like, provided, no damage arise from the same to the buildings or monuments erected by the owners of the adjoining property. Public things are those the property of which belongs to a whole nation, and the use of which is allowed to all the members of the nation: Of this kind are navigable rivers, sea ports, roads, harbours, high ways, and the bed of rivers as long as the same is covered with water. The use of the shores of navigable rivers or creeks is public; accordingly every one has a right freely to bring his ships to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like. Nevertheless the property of the river shores belong[s] to those who possess the adjoining lands. ... Wild beasts, birds and all the animals which are bred in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly by the law of nations, the property of the captor; for it is agreeable to natural reason, that those things which have no owner, should become the property of the first occupant. And it is not material whether they are taken by a man upon his own ground or upon the ground of another. But yet it is certain that whoever has entered into the ground of another for the sake of hunting or fowling, might have been prohibited from entering by the proprietor of the ground if he had foreseen the intent."

cf Digest of 1808

These principles, among the body of civil laws in force at the dawn of Louisiana statehood,[1] have spawned substantial modern debate and litigation over the issue of public access to and use of the waters and bottoms of both navigable and non-navigable water bodies in Louisiana. This presentation will examine the debate, the recent legislative and judicial developments which have addressed the issue of public access to water bodies in Louisiana, and some implications of both for mineral rights owners and operators.

I. *A Brief Background to the Controversy*

The Civil Code. Our modern Civil Code declares air and the high seas to be common things, owned by no one and subject to free use by

---

[1] *See* Articles 3, 4, 5, 6, and 8 of "A Digest of the Civil Laws Now in Force in the Territory of Orleans, With Alterations and Amendments Adapted to its Present Form of Government," enacted March 31, 1808 by the territorial legislature. For a detailed background to the development of the law of Louisiana in this area, *see* the Louisiana State Law Institute Advisory Opinion relative to non-navigable waterbottoms in light of *Phillips Petroleum Co. v. Mississippi* at 53 La. L. Rev. 35, 40-68 (1992).

everyone conformable with the use that nature intended.[2] Running waters, the waters and bottoms of natural navigable water bodies,[3] the territorial sea, and the seashore are classified as public things that belong to the state.[4] The Code provides that everyone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, so long as he does not cause injury to the property of another. Public use of both public and common things must accord with applicable laws and regulations.[5]

The banks of navigable rivers or streams are private things that are subject to public use, but, according to well-settled Louisiana jurisprudence, the servitude of public use on the bank is limited to purposes that are incidental to the navigable character of the stream and its enjoyment as an avenue of commerce.[6] The beds of nonnavigable rivers, streams or lakes are private things.[7] Under the Code, the owner of a tract of land may forbid entry to anyone for purposes of hunting or fishing, and the like, but, despite a prohibition of entry, captured wildlife belongs to the captor.[8]

Policy Declarations. In 1954, the Louisiana Legislature declared that it has been the public policy of the State of Louisiana at all times since its admission into the Union that all navigable waters and the beds of same within its boundaries are common or public things and insusceptible of private ownership and that no act of the Louisiana Legislature has been enacted in contravention of that policy.[9] In 1978, the Legislature proclaimed as "public trust" policy that "the beds and bottoms of all

---

2 C.C. art. 449.

3 The 1978 Revision Comments explain that "natural navigable water bodies" refers to inland waters the bottoms of which belong to the state either by virtue of its inherent sovereignty or by virtue of other modes of acquisition including expropriation.

4 C.C. art. 450.

5 C.C. art. 452. For example, in 1995 the State of Louisiana through the Department of Wildlife and Fisheries imposed use limitations upon state-owned lands within the Sherbourne Wildlife Management Area of the Atchafalaya Basin in Iberville Parish. Emergency regulations adopted May 4, 1995 included provisions which closed certain tracts of recently forested land to crawfishing, set a crawfish season on the remainder of the property, required a crawfish permit and set a fee therefor and restricted use of motor boats on some of the property. *See* LAC 76: VII.177, reprinted at Volume 21 Louisiana Register No. 5. These regulations were deemed necessary due to the negative impact on wildlife and timber resources from unregulated commercial and recreational crawfishing on the public property.

6 C.C. art. 456 and comment (b).

7 *See* C.C. art. 506 and the comments thereunder.

8 C.C. art. 3413.

9 *See* La. R.S. 9:1107, *et seq*. Note in this regard Article IX, Section 3 of Louisiana's Constitution.

navigable waters and the banks or shores of bays, arms of the sea, the Gulf of Mexico, and *navigable* lakes, belong to the State of Louisiana and the policy of this state is declared to be that these lands and waterbottoms, hereafter referred to as "public lands," shall be protected, administered and conserved to best insure full public navigation, fishery, recreation, and other interests. Unregulated encroachments upon these properties may result in injury and interference with the public use and enjoyment and may create hazards to the health, safety, and welfare of the citizens of this state. To provide for the orderly protection and management of the *stateowned* properties and serve the best interests of all citizens, the lands and waterbottoms, except those excluded and exempted herein below, or as otherwise provided by law, shall be under the management of the Department of Natural Resources ... which shall be responsible for the control, permitting, and leasing of encroachments upon public lands, in accordance with this Chapter and the laws of Louisiana and the United States."[10]

The Phillips Decision. A decade later, the United States Supreme Court, in a 5-3 decision, ruled in *Phillips Petroleum v. Mississippi*,[11] that the public trust doctrine, derived from English common law, vested in the State of Mississippi, by right of sovereignty, ownership of all lands under waters subject to the ebb and flow of the tides, including the beds of non-navigable waters located several miles inland from the Gulf Coast but nonetheless subject to tidal influence because they were adjacent and tributary to the navigable Jourdan River which flows directly into the Gulf. The court found that the State of Mississippi had consistently recognized a public trust title to lands under tidewaters and a public trust interest in the use of such lands beyond just navigation, and including recreation, fishing and mineral development. The ruling effectively divested private ownership of the affected waterbottoms under a record title spanning more than a century, which had included payment of taxes to the state of Mississippi on the disputed lands, prompting reexamination in many states of the "public trust" limits of sovereignty title claims, including in Louisiana. By Act 998 of 1992 (La. R.S. 9:1115.1, *et seq.*), the Legislature sought to distinguish the law of Louisiana from the state law of Mississippi and "thereby quiet titles to lands which have long been owned by private persons but which titles may have been clouded as a result of the *Phillips* decision." Consistent with a Louisiana State Law Institute Advisory Legal Opinion relative to non-navigable waterbottoms,[12] the Act declared inland non-navigable water

---

[10] *See* La. R.S. 41:1701, *et seq.* (emphasis added). *See also* R.S. 56:640.3 (regarding regulatory protection of the right to fish marine waters).

[11] 484 U.S. 469. 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988).

[12] *See* 53 La. L. Rev. 35 at 67, 68, concluding that Louisiana law and jurisprudence had historically regarded navigability as the hallmark of the public trust limitations af-

beds and bottoms which are not sea, arms of the sea, or seashore but which are subject to being covered by water from the influence of the tide, to be private things which may be owned by private persons or by the state and its political subdivisions in their capacity as private persons. The Act also declared that no provision therein shall be interpreted to create, enlarge, restrict, terminate, or affect in any way any right or claim to public access and use of such lands, including but not limited to navigation, crawfishing, shellfishing, and other fishing, regardless of whether such claim is based on existing law, custom and usage, or jurisprudence.

A Look at a Brewing Controversy. A 1995 Report by the Rights to Public Access Committee of the Louisiana State Law Institute considered assertions of public access rights under state and federal law to inundated private lands, including claims arising under the Commerce Clause of the United States Constitution, the Public Trust Doctrine, Louisiana's Act of Admission into the Union, the classification of common, public, and private things under state law, and the legal servitudes imposed by state law on certain private things. While noting the possible effects of pending litigation, the Committee opined that:

> ▪ apart from the possibility of rights of access recognized in *Vaughn v. Vermilion Corporation*, 444 U.S. 206, 100 S. Ct. 399, 62 L. Ed. 2d 365 (1979) if, in the construction of a private canal, the navigability of previously navigable public waterways is destroyed, individual rights of access exist only as a matter of state law;
>
> ▪ as a matter of state law, the right to control access to property will generally depend upon the classification of the property as either public or private, but there is generally no right to access or use lands classified as private, even when periodically overflowed by running waters, unless the public has in some manner acquired rights of access from the owner or such rights are conferred by law;
>
> ▪ the public enjoys the right of use in the beds of state-owned navigable rivers and streams, between the limits of ordinary low water, and in the beds of state-owned navigable lakes and bays, within the limits of ordinary high water, subject to any lawful restrictions and regulations adopted by the state;
>
> ▪ the public's right to use the banks of navigable rivers and streams is limited to purposes incidental to their navigable character and enjoyment as avenues of commerce which would include the

---

fecting Louisiana waterbottoms in much the same fashion as the dissenting justices in *Phillips* viewed the common law public trust doctrine, that the bottoms of inland nonnavigable water bodies (beyond the sea or seashore), even if influenced the tide, have been recognized in Louisiana to be private things susceptible of private ownership, and that the acquisition of title by right of sovereignty does not of itself preclude divestiture of such title into private ownership, as with Louisiana law governing the banks of navigable streams.

right to navigate over water-covered banks. The Committee could reach no informed conclusion as to which particular uses are permitted by C.C. art. 456, finding no available law or jurisprudence squarely dealing with the right to fish or hunt from a boat navigating in waters above the bank but noting broad language in *Warner v. Clarke*, 232 So.2d 99 (La. App. 2nd Cir. 1970), writ denied; *Edmiston v. Wood*, 566 So.2d 673 (La. App. 2nd Cir. 1990), and C.C. art. 3413 that could be read to foreclose such public rights;

- it is doubtful that personal servitudes can be acquired by the general public by prescription, and Louisiana courts have been reluctant to find that servitudes of use have been created through tacit dedication;

- there is no right of access to sovereignty lands under any notion of a state public trust doctrine, the rights being instead found in the traditional classification of some things as public and by the legal servitudes of public use imposed for limited purposes on certain private things;

- any legislation which deprives a landowner of the ability to control access to property over which he currently has that authority is likely to result in a taking for which compensation is due.

It is perhaps not surprising that private ownership rights and public use claims would eventually collide in a state dubbed the "Sportsman's Paradise" or that a major battleground would be the Atchafalaya Basin,[13] where some members of the public at large—claiming "water rights"—are converging on prime crawfishing and hunting terrain in swamp, marsh, or shallow lake basins, often through private canals or sloughs (in low water periods) or over flood waters (in high water periods), challenging private ownership rights vested by state and federal patents issued over a century ago to these natural swamp and overflowed lands.[14]

---

[13] The Atchafalaya Basin contains over two million acres, some 595,000 of which are embraced within a floodway more than 130 miles long, along which guide levees now artificially confine the area affected by the floodway's major water course, the Atchafalaya River. The Lower Atchafalaya Basin Floodway alone contains lands and waterbottoms situated within six Louisiana parishes, including vast areas of swamp and overflowed land under private ownership emanating from the Federal Swamp Land Grants of 1849 and 1850.

[14] It has been estimated that over 8.9 million acres of land were approved to the State of Louisiana as swamp and overflowed pursuant to the Federal Swamp Land Grant Acts. The purpose of these grants was to aid the State of Louisiana, through the revenues to be generated by the sale and subsequent taxation of such lands, in constructing the necessary levees and drains to protect the valuable agricultural lands, plantations and settlements along the Mississippi River and its major distributaries from annual floods and to reclaim the swamp and overflowed lands within the State. *See* Act of March 2, 1849, C. 87, 9 Stat. 352 and Act of September 28, 1850, C. 84, 9 Stat. 519; *see* 43 U.S.C. §981 et seq.; *see* also La. Acts 74 of 1892, 18 of 1894, 160 of 1900 and 205 of 1910; and Madden, *Federal and State Lands in Louisiana* (1973) at pages 259 *et seq.*, particularly page 276, footnote 92. In

There has apparently existed since early in the last century a perception by many that land within the Basin was open to use by anyone for hunting, trapping, fishing, and the like without the need for permission from anyone. A tolerance of public use by many owners of land which was unsuitable for cultivation, habitation or similar uses because of its character as swamp or its exposure to annual floods,[15] or too difficult or expensive to regularly post and patrol, opened the door to modern practices now claimed to be a cultural tradition. Louisiana jurisprudence has long recognized that mere tolerance of a public use of private property such as hunting or fishing over a long period of time does not create a right or servitude in the public or prevent a landowner from thereafter attempting to restrict or prohibit such public use.[16] Louisiana jurisprudence has also recognized that the public at large does not have the right to hunt, trap or fish on the banks of navigable rivers without permission from the riparian owner.[17] Doctrinal authorities on Louisiana property law have similarly recognized that the banks of navigable rivers and swamp lands sub-

---

McDade v. Bossier Levee Board, 109 La. 625, 33 So. 628 (La. 1902), the Louisiana Supreme Court affirmed that even permanently overflowed lands, or so-called shallow lakes, were included within the federal swamp land grants.

[15] The principal commercial value of such land was frequently viewed in terms of its timber resources and/or potential for mineral development. Moreover, given the nature of such lands, the regular physical presence required for practical abatement of such uses could seldom be justified.

[16] *See*, for example, *McCearley v. Lemennier*, 40 La. Ann. 253, 3 So. 649 (La. 1888); *Amigo Enterprises, Inc. v. Gonzales*, 581 So. 2d 1082 (La. App. 4th Cir. 1991); *Cenac v. Public Access Water Rights Association, et al*, 851 So. 2d 1006 (La. 2003); *Schoeffler, et al v. Drake Hunting Club, et al*, 919 So. 2d 822 (La. App. 3rd Cir. 2006) [The Court commented: "We cannot avoid the observation that where one owner of long ago may have invited the public to fish and hunt his land, a modern owner may be less generous, or more concerned with liability associated with free access, or obligated to his lessors who pay for the privilege of access. The argument that a thing has 'always' been done, does not provide a cause or right of action."]; compare La. R.S. 9:1251. Opinions of the Attorney General of the State of Louisiana have also recognized the right of private landowners to prohibit commercial fishermen from crawfishing on privately owned swamp land that is inundated by adjacent water bodies, or to prohibit hunting, trapping or fishing on the banks of navigable streams. *See*, e.g., Louisiana Attorney General Opinion Nos.40-96, 77-1540, 88-649, 91-195.

[17] *See*, e.g., *State v. Richardson*, 72 So. 984 (La. 1916); *Delta Securities Co. v. Dufresne*, 160 So. 620, 181 La. 891 (La. 1935); *Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970), writ denied; *Edmiston v. Wood*, 566 So.2d 673 (La. App. 2nd Cir. 1990); *Buckskin Hunting Club v. Bayard*, 868 So. 2d 266 (La. App. 3rd Cir. 2004); *Walker Lands, Inc.. v. East Carroll Parish Police Jury*, 871 So. 2d 1258 (La. App. 2nd Cir, 2004), writ denied 903 So. 2d 442 (La. 2005). Louisiana courts have also indicated that riparian servitudes, being in derogation of private property rights, must be strictly construed in accordance with the law and not given a broad, liberal interpretation. *Warner v. Clarke supra*; *Meyers v. Denton*, 747 So. 2d 633 (La. App. 3rd Cir. 1999), writ denied.

ject to overflow are private things on which the public does not enjoy the right to hunt or fish.[18]

In *Warner v. Clarke*,[19] the Second Circuit Court of Appeal refused to enjoin the prosecution of plaintiffs for criminal trespass arising from their desire to hunt and fish on privately owned lands adjacent to the Mississippi River situated between the levee and the river. In rejecting the plaintiffs' right to an injunction, the Court recognized that plaintiffs enjoy no property right to hunt and fish on such lands under the public servitude granted by law to use such lands for purposes incident to navigation upon the Mississippi River. In *Edmiston v. Wood*,[20] the Second Circuit considered a claim of public right to hunt and fish upon privately owned land bordering on the Mississippi River and adjoining Yucatan Lake in Northeast Louisiana which had been posted against trespassing by the owner. The posted lands were generally covered by bottomland hardwood timber and had been used by the private owner for many years for commercial timber operations, pasturage and the leasing of hunting rights thereon. Portions of the land were subject to occasional flood from backwaters of the Mississippi River only during certain high water periods. When the river reached levels in excess of 16' at Vicksburg, the waters of the river would cover portions of the land permitting entry over and across the land by boat from the river or the adjacent navigable lake due to the fact that a portion of the land was submerged under flood waters of the river and/or lake. Plaintiffs argued that when the river is high enough to flood the land to a depth sufficient to allow navigation thereon, the land became part of one or both of these navigable bodies of water and was subject to public use. The appellate court noted that the lands in question did not comprise a portion of the banks of either of the navigable bodies of water, holding that land does not become subject to public use when a navigable body of water overflows its normal bed and temporarily covers the adjacent privately owned land.

State v. Barras,[21] considered the validity of trespass charges brought against two crawfishermen for actively conducting commercial crawfish harvesting on lands south of the Lake Long area of the Atchafalaya Basin without permission of the owners and after being orally forbidden to remain on such lands. The lands involved were flooded swamp lands, inundated by waters of the Atchafalaya River and its distributaries for up to six months of each year with depths of water in the crawfishing areas

---

[18] *See* A.N. Yiannopoulos, La. Civil Law Treatise, Vol. 2, *Property*, §§56-61,85 (3rd Ed., 1991). Note also La. R. S. 56:648.1, prohibiting such activities by any person on private property in disturbance or harassment of hunters, trappers or fishermen who have been given permission by the owner to take wild animals.

[19] 232 So.2d 99 (La. App. 2nd Cir. 1970), writ denied.

[20] 566 So.2d 673 (La. App. 2nd Cir. 1990).

[21] 615 So.2d 285 (La. 1993).

ranging from 6 inches to 6 feet. The crawfishermen claimed that the lands were subject to public use as part of the banks of navigable streams or by being covered by public navigable waters. The Louisiana Supreme Court affirmed the trespass convictions, recognizing that the area in question was backwater swamp land within the Atchafalaya River's floodplain which did not, by its mere susceptibility to crawfish activity and navigation during flood conditions, become public navigable waters or render the private property subject to public use.

In 1995, the United States District Court for the Western District of Louisiana, in a case entitled *Charles R. Blanchard, Sr. and West Louisiana Crawfish Producers Association, Inc. vs. Williams, Inc. and Atchafalaya Crawfish Conservation Association*, Civil Action No. 92-0941 L-O, involving 95,000 acres of land within the Atchafalaya Basin, determined, among other things, that no individual federal rights to fish and navigate in the massive area of privately-owned swamp land placed in dispute in that proceeding arose under the public trust doctrine or under the Act of Admission of Louisiana into the Union in 1812,[22] and that there is no federal constitutional right to crawfish on privately-owned subaqueous land, even if navigable-in-fact to commercial crawfishermen. The court observed that, because activities such as crawfishing do not in any way constitute navigation or traversal, and, in fact, tend to create obstacles to pure navigation and traversal, such activities clearly fall outside the scope of any navigational servitude which may or may not be imposed upon the area in question under federal law. That decision was affirmed by the United States Court of Appeals for the Fifth Circuit,[23] and a petition for a writ of certiorari was denied by the United States Supreme Court.

Article 3413 of the Louisiana Civil Code expressly recognizes that a landowner enjoys the exclusive right to hunt and fish and conduct like activities on his property and may forbid entry to anyone for such purposes. As recognized in *Kaiser Aetna v. United States*,[24] the "right to exclude" is universally held to be a fundamental element of the right of private property, falling clearly within the category of interests that the government cannot take without compensation.[25] Thus, any attempt to rec-

---

[22] The Act stipulated that the Mississippi River and the navigable rivers and waters leading into same and into the Gulf of Mexico shall be common highways and forever free to the inhabitants of Louisiana and of the other states and territories of the United States without tax, duty, impost or toll imposed by the state. Act of February 20, 1811; *see* 2 Stat. 642; 33 U.S.C.§10; *see* also *Boykin & Lang v. Shaffer*, 13 La. Ann. 129, 130-131 (1858), *Dardar v. Lafourche Realty Company, Inc.*, 985 F. 2d 824 (5th Cir. 1993).

[23] 98 F. 3d 1339 (5th Cir. 1996).

[24] 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979).

[25] *See also Mongrue v. Monsanto Company*, 1999 WL 219774, 1999 U.S. Dist. Lexis 5543 (E.D. La. April 9, 1999), affirmed at 249 F.3d 422 (5th Cir. 2001); *Dardar v. Lafourche Realty Co., Inc*, 985 F. 2d 824 (5th Cir. 1993) (Inland non-navigable water bodies

ognize a general public right of access and use for fishing, hunting, trapping and similar uses under the Commerce Clause of the United States Constitution could run afoul of the Fifth Amendment and amount to a taking of private property without compensation.

II. *A Closer Look at the Recent Developments*

Cenac v. Public Access Water Rights Association, et al, 851 So. 2d 1006 (La. 2003)

Action by a landowner to (i) obtain declaratory judgment establishing his ownership and possession of property in Lafourche Parish including a parking area, boat launch, and a portion of a private canal known as the Company Canal connecting Bayou Lafourche and Bayou Des Allemands and providing access to Lake Salvador and (ii) enjoin the defendants from engaging in acts that interfere with his use and enjoyment of the property. The defendants included a local community association and several individuals who claimed possession of real rights—by unopposed use for several years—in the form of a servitude of right of way and use to cross the property, use the parking area, and launch boats into the canal, which was disturbed by the plaintiff's attempt to erect a security fence around the boat launch and parking area. The defendants also claimed that the public had acquired a servitude of use of these areas by implied dedication, and, alternatively, that the Company Canal was a public canal, was formally dedicated to public use, or was a private canal subject to public use.

The trial court declared Cenac the owner of the property in dispute and issued a permanent injunction barring the defendants from launching, parking or otherwise using the boat launch but declaring that Cenac's ownership of the canal was burdened by a servitude of use in favor of the public by virtue of implied dedication. The First Circuit Court of Appeal affirmed the grant to Cenac of the permanent injunction but reversed the judgment declaring the canal to be dedicated to public use by implied dedication, as the defendants had failed to establish the plain and positive intent of the landowners to dedicate the canal and boat launch to public use. The Louisiana Supreme Court granted certiorari to examine the issue of implied dedication.

The Court noted that the defendants had conceded that they had not acquired a servitude over the property by acquisitive prescription and that the only method of dedication applicable to the case was implied

---

and swamp land subject even to indirect tidal overflow may be privately-owned under Louisiana law). Note also in this regard the Submerged Lands Act, which expressly recognizes that the use of submerged lands beneath navigable waters of the United States for fisheries was vested either in the State of Louisiana *or the private individuals in ownership of the lands or the right to fish thereon* as of the effective date of that legislation. *See* 43 U.S.C §1311(a). Thus, La. R.S. 41:1701 recognizes public fishery interests of the State in, and its management authority over, *state-owned* navigable *waterbottoms.*

dedication.[26] The Court observed that implied dedication was a common law doctrine recognized by Louisiana courts since the nineteenth century, which, because it lacked the formalities and safeguards of the other modes of dedication, requires "an unequivocally manifested intent to dedicate on the part of the owner and an equally clear intent to accept on the part of the public." The Court specifically held that while maintenance [of the way or road] by a municipality can be a factor in determining whether an implied dedication has been made, it is not required, and repudiated any language of prior cases suggesting otherwise. The Court observed that implied dedication results only in a servitude of public use and does not transfer ownership, and that the burden of proving such dedication falls on the party asserting the dedication.[27]

According to the Court, for an implied dedication to occur, the "plain and positive intent to dedicate" must be shown by language or acts so unequivocal and decisive of an intent to abandon the property to the specific public use as to exclude every other hypothesis but that of dedication. An owner's toleration of and acquiescence in long and continuous public use of his land, without more, is insufficient to establish a plain and positive intent to dedicate. Moreover, although the private canal was navigable, this fact alone does not render it public.[28]

The evidence at trial indicated that the public had been using both the boat launch and the canal for at least 60 years. Prior owners of the canal never interfered when the public used the boat launch and the canal for access to Lake Salvador. Evidence also indicated some minor acts of maintenance of the boat launch by the public (e.g., filling pot holes, picking up trash, installing cleats to tie up boats) and some spraying of the canal to keep it free of vegetation that would prohibit navigation. The

---

[26] The Court noted that the Louisiana legislature has never enacted a comprehensive scheme governing dedication to public use, but that the courts have recognized four modes of dedication to public use: formal, statutory, implied and tacit.

[27] Among its material findings, the Court agreed with the trial court that La. R.S. 9:1251 applies only to the boat launch and does not prevent the acquisition of a public servitude over the waters of the canal. R.S. 9:1251 recognizes that a landowner may voluntarily permit passage across his land by the public for the purpose of providing a convenience in access to and from waters for boating, and even allow maintenance of such passage by a governing authority, without thereby establishing a servitude of passage in favor of the public or a public road or street. The statute does not exclude, however, the possibility for a landowner to specifically dedicate such passages to public use.

[28] Uncontroverted evidence at trial indicated that when the canal was built, it did not divert any natural stream or water body. Note also that the ruling disregards comments made in an earlier decision of the Court involving possession of the partially submerged bed and bottom of the non-navigable Amite River, which inferred that fishing, swimming, and digging for clams were natural activities done in the use of running waters of the state by members of the public at large. *See Chaney v. State Mineral Board*, 444 So. 2d 105 at 111 (La. 1983). Note *Dardar v. Lafourche Realty Co,, Inc.*, 985 F. 2d 824 at 834 (5th Cir. 1993).

Supreme Court noted, however, that evidence also revealed that the prior owners took pains to insure that the property remained private and not subject to any rights in favor of the public by posting signs at the launch and canal asserting the private nature of the property (for at least 30 years), gave explicit permission to use the property to those who requested it, prohibited hunting in the canal and other unapproved uses by the public, retained responsibility for maintenance of the property (instructing employees that no public funds were to be spent on the property), and made no attempt to acknowledge any right of the public to the boat launch or canal in the sale of the property to Cenac.

On consideration of the evidence, the Court ruled that the trial court legally erred in concluding that because the canal was built for the purpose of navigation and had been used by the public for navigation for many years, an implied dedication occurred. The central issue was whether the previous owners unequivocally manifested a plain and positive intent to dedicate the boat launch and canal to public use. Finding permissive use and minor maintenance of the launch and canal by the public, in itself, insufficient to establish such intent,[29] the Court found that the defendants failed to present evidence sufficient to show a plain and positive intent to dedicate to the exclusion of every other hypothesis but that of dedication, and that, as the court of appeals decided, neither the boat launch nor the canal was burdened with a servitude of public use by implied dedication.

***Buckskin Hunting Club v. Bayard*, 868 So. 2d 266 (La. App. 3rd Cir. 2004).**

Action by a hunting lessee of approximately 14,000 acres of land in the Atchafalaya Basin for an injunction prohibiting six individuals claiming public use rights from entering the leased property. The defendants asserted various theories of public access to the lands and private canals within the leased premises arising from "navigability" of the affected property, even contending that at certain stages of the water they were arguably entitled to use all the land between the eastern and western guide levees of the Basin.[30] After considering extensive testimony and other evidence, the trial court granted the permanent injunction prohibiting the defendants from hunting in the private man-made canals, or on or along the banks of navigable rivers, bayous or streams, or in or upon any

---

[29] Evidence regarding the enlarging of the parking area by the owners out of liability concerns about cars parking too near the highway was not deemed inconsistent with preserving rights of unencumbered private ownership in the property.

[30] The trial court observed in this regard that the Atchafalaya Basin is not itself a natural waterway, but rather is a creation of the United States Army Corps of Engineers which artificially regulates, to some degree, the amount of water existing in the Basin at any time.

of the private land[31] situated within the boundaries of the leased property, even if such lands are periodically inundated by water. The injunction prohibited not only the shooting of deer or other wildlife on such private lands from boats in the waters of such rivers, bayous, streams and canals, but also precluded allowing dogs owned, used or under the custody and control of defendants from entering the leased property to hunt or chase deer or other wildlife or for any other purpose. In addressing the various public use issues raised by the defendants on appeal, the Third Circuit Court of Appeal quoted approvingly from the findings and legal analysis of the trial court, summarized herein as follows:

Regarding use of private lands periodically inundated with water:

> In this case, it was acknowledged that the water levels in the Basin may cover land areas, from time to time, anywhere from six inches to twelve feet. This does not convert all of the land that becomes covered with water to "banks" which are subject to public use. [citing *State v. Barras,* 615 So. 2d 285 (La. 1993)] There is no issue in the Court's mind but that this privately leased land is not subject to use by the public merely because during some periods of the year it is flooded swampland. This Court recognizes the difference between the banks of a navigable river and the flood plains of a navigable river, in this case, the Atchafalaya River. As to those banks which are along navigable rivers within the leased premises, the uses of these banks are limited to navigation and not hunting.

Regarding use of private canals and waterways:

> Defendants argue that if a man-made canal system destroyed the navigability of surrounding natural waterways, this may constitute a defense to trespass by use of the private canal because the private canal becomes subject to public use. There was testimony from some of the defendants ... that previous navigable waterways were silted up ... due to the construction of man-made canals in the vicinity; however, they also acknowledge that the Corps of Engineers began controlling the water level in the Basin. Further, defendants did not present any expert testimony or specific factual bases to support this claim. While it is important that the Basin remain traversable so that individuals may get to their private land and the public may access State land, this does not allow the public to use privately owned canals at will and to hunt from within these privately owned canals.
>
> Defendants argue that there was an expenditure of public funds for cleaning up the banks of some of the man-made canals after Hurricane Andrew. However, defendants did not present any evidence of the express or tacit agreement of the private landowners. ... Without

[31] Lands claimed by the State were not at issue in the proceeding.

establishing consent of the private landowners, the state cannot unilaterally spend money on private waterways thereby converting them to public use without the agreement of the landowner and/or some exercise of [eminent] domain which would necessarily involve just compensation.[32]

Additionally, the fact that the canal is navigable in fact does not thereby render it public.[33]

Regarding public access to "running waters":

The obligations arising from water being a public thing requires the owner through whose estate running waters pass to allow water to leave his estate through its natural channel and not to unduly diminish its flow; however, this does not mandate that [the] landowner allow public access to the waterway.[34] Landowners and members of [the] general public have [the] right to use running water for their needs, if they have access to it, but neither landowners nor the members of [the] general public have the right to cross private lands in order to avail themselves of running water, and such right may only be established by agreement, destination of [the] owner, or prescription. No public rights to use of a canal on private property arise from the fact that water flows through the channel.

Regarding Corps of Engineers jurisdiction over "navigable waters of the United States:"

Defendants also contend that by virtue of the regulations of the Corps of Engineers, these man-made canals fall within the definition of navigable waters subject to public use. ... The regulations cited by Defendants merely allow the Corps to seek to exercise regulatory control should it determine that, in fact, the waterway is within its jurisdiction and regulatory powers. ... this would be something that would be sought by the Corps, on a canal by canal basis. There is no such issue involved in this case... .The Defendants have no basis to assert the right of the Corps of Engineers to control or regulate the private waterways herein, especially in view of the fact that the Corps has not seen fit to do so.[35] In *Vaughn v. Vermilion Corporation*, 444 U.S. 206, 100 S. Ct. 399, 62 L. Ed. 2d

---

[32] Citing *Amigo Enterprises, Inc. v. Gonzales*, 581 So. 2d 1082 (La, App. 4th Cir. 1991).

[33] Citing *National Audubon Society v. White*, 302 So. 2d 660 (La. App. 3rd Cir. 1974), writ denied.

[34] Citing, *inter alia*, *People for Open Waters, Inc. v. Estate of Gray*, 643 So. 2d 415 (La. App. 3rd Cir. 1994).

[35] The trial court concluded that the exercise of this regulatory power would still not allow the Defendants to hunt in the private canals or along the banks of the navigable rivers or private swampland thereof.

365 (1979), the court held that no general right of use in the public to a private canal arises by reason of the authority over navigation conferred upon Congress by the Commerce Clause of the constitution.

The Third Circuit Court of Appeal also observed that the testimony in the case was undisputed that, at various times of the year, the property in question may be traversable by the defendants and others in various size boats. This fact, however, does not make those waterways navigable as that term is used in the jurisprudence and in La. Civ. Code art. 450 [definition of public things], noting that the Louisiana Supreme Court's *Barras* and *Cenac* decisions demonstrate that the presence of water during a portion of the year does not alone qualify an area as a navigable waterway, and the mere fact that a canal is navigable does not render it public.[36]

Citing comment (b) to La. Civ. Code art. 456, *Edmiston v. Wood*, 566 So. 2d 673 (La. App. 2nd Cir. 1990), and 2 Yiannopoulos Civil Law Treatise, Property §85 (4th Ed. 2001), the Court of Appeal affirmed the trial court's determination that the lawful public uses of the banks of navigable streams are limited to those incident to navigation and do not include hunting, a prohibition equally applicable to the overflowed lands adjacent to such navigable waterways.[37]

Act 813 of 2004 added La. R.S. 9:1254 which provides that the owner of an enclosed estate who has no access to his estate other than by way of an existing waterway through neighboring property (due to the lack of sufficient land on which to feasibly construct a road) shall have a right and servitude of passage on such waterway. The existing waterway must be directly accessible from a publicly navigable waterway (and the least injurious, shortest route of safe passage by water), and must have been and still be capable of use for navigation by the owner of either the dominant or the servient estate at the time of the acquisition by the owner of the dominant estate.

Act 927 of 2004 proposed an amendment to the Louisiana Constitution to guarantee the right of every citizen to hunt, fish, and trap, subject to regulation, restriction, or prohibition as provided by law. As ratified by Louisiana voters and adopted into law, effective December 7, 2004, Article I, Section 27 of the Louisiana Constitution now provides:

> The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. Hunt-

---

[36] The Court also commented that the trial court was not required, in its credibility/weighing assessments, to credit defendants' testimony regarding their opinion as to the diversion of natural waterways through the construction of privately-owned canals.

[37] Citing *Barras* and *Edmiston*, *supra*.

ing, fishing and trapping shall be managed by law and regulation consistent with Article IX, Section 1 of the Constitution of Louisiana[38] to protect, conserve and replenish the natural resources of the state. The provisions of this section shall not alter the burden of proof requirements otherwise established by law for any challenge to a law or regulation pertaining to hunting, fishing or trapping the wildlife of the state, including all aquatic life. Nothing contained herein shall be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property.

***Walker Lands, Inc. v. East Carroll Parish Police Jury*, 871 So. 2d 1258 (La. App. 2nd Cir, 2004), writ denied 903 So. 2d 442 (La. 2005).**

Action by a landowner to obtain a declaratory judgment that Gassoway Lake and a drainage ditch which runs into the lake and provides water to the lake in periods of high water on the Mississippi River are not subject to public use and to obtain an injunction against the parish police jury to stop all public use of Gassoway Lake and the drainage ditch. The police jury joined the State of Louisiana to defend title and access to the alleged public lands and was later dropped from the suit. The State claimed ownership and/or a servitude to the bed, bottoms, and waters of Gassoway Lake and the drainage ditch.

Evidence at trial established that the land where Gassoway Lake now sits was either woods or farmland in 1812, but became part of the bed of the Mississippi River when the river shifted westward by 1880. The river then shifted back eastward, leaving behind dry land and standing water in a shallow swale in the land, the area today called Gassoway Lake. Opposing theories by expert witnesses were presented regarding the effects of the eastward shift on the modern landforms. According to plaintiff's expert, the land now occupied by Gassoway Lake was created through alluvion or accretion as the river shifted slowly and imperceptibly eastward to its current channel approximately 3½ miles from the lake. The lake is very shallow and has remained so since its formation, being landlocked most of the year and receiving water only when the Mississippi River floods causing water to enter the ditch and spill over into the lake. A levee west of the lake contains the periodic floodwaters on the Mississippi River which submerge Gassoway Lake and the surrounding land, but these lands remain well above the ordinary low water mark of the river. The State's expert witness suggested that Gassoway Lake was created as a result of chute cut-off – the opening of a new channel by the Mississippi River surrounding riparian land so as to make

[38] Section 1 provides that the natural resources of the state and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

it an island, and that the lake was part of the main River channel in 1881 and remained part of the channel within the alluvion build-up after the river moved eastward, eventually cutting the lake off from the river.

The trial court accepted as more credible the plaintiff's theory regarding the creation of Gassoway Lake, concluding that Gassoway Lake, the drainage ditch, and the land between Gassoway Lake and the river were owned by Walker Lands and that the lake and the ditch were not navigable in fact or in law, and issued a permanent injunction prohibiting the State or the general public from going on or about Gassoway Lake, the drainage ditch, or the land between the lake and river. On appeal, the State argued that Gassoway Lake was created from the former bed of the Mississippi River, remained navigable and connected to the river as a channel, and is public water under the law. It also argued that it is burdened by a navigation servitude, a levee servitude and the public use when below the ordinary high water of the Mississippi River. The Second Circuit Court of Appeal found no clear error in the trial court's findings that the Lake was created as a swale in the alluvial deposition which occurred with the eastward movement of the river channel and that, as private property outside the bed of the river, it is not rendered public land when the river overflows its normal bed and temporarily covers the land in periods of flood. The Second Circuit also affirmed the trial court's non-navigability determination, noting that the evidence showed that the lake was landlocked and the ditch was completely dry for most of the year, making both unusable and unable to serve a useful commercial purpose – a burden not met by demonstrating recreational use alone.

The Court pretermitted discussion of the State's claim to public use of the Lake and ditch under legal public use servitudes affecting the river bank and the levee, finding that there was no justiciable controversy presented showing that the State, through its agents, sought to use any rights to such servitudes. The Court noted, however, that Louisiana jurisprudence has long held that the public use servitude on the banks of a navigable river means that the public may use the bank only for a navigational purpose, which does not include fishing and hunting on flooded lands within the high water mark of the river, citing the *Barras* and *Warner v. Clarke* decisions. The Court reversed the permanent injunction issued by the trial court, finding that plaintiff can be given no relief from a hypothetical public-at-large (as opposed to specific individuals), and that there was no evidence of any violation by State officials or departments in attempting to invade plaintiff's property, no justiciable controversy to warrant an injunction against the State, but that plaintiff could use traditional remedies under the trespass statutes, or in damages or injunctive relief, against specific persons or entities which attempt to exploit its private property.

***Schoeffler, et al v. Drake Hunting Club, et al*, 919 So. 2d 822 (La. App. 3rd Cir. 2006).**

Action by five individuals claiming public use rights to fish, crawfish, hunt, and navigate the waters of the Atchafalaya Basin for commercial and recreational purposes. The original complaint requested a declaratory judgment and asserted a boundary action against private landowners and hunting and crawfishing lessees alleging that posted signs and patrolling, among other actions, have impeded plaintiffs' alleged right of public access to waters, tidal-influenced waterbottoms and the private banks of streams subject to public use. The declaratory judgment action requested (i) a declaration that the waters and areas at issue were all running waters or bottoms of navigable waterbodies subject to the influence of the tides and therefore public things subject to public use, and (ii) a declaration that plaintiffs were entitled to fishing access and other public use below the ordinary high water mark of Lake Chetimaches, a large ancient water feature within the Basin which plaintiffs alleged now includes six named lakes and associated tributary and distributary waters, and (iii) an order requiring the defendants to remove "no trespass" signs and other impediments to public access. The boundary action requested the court to fix a high water boundary within the challenged areas (affecting more than 85,000 acres of privately-owned land) which would delineate the areas subject to public use. An amended complaint by plaintiffs added the State of Louisiana as a defendant and requested the aforementioned declaratory relief and asserted a mandamus action to compel the State to "represent the public interest" and bring an action to fix the public use boundaries against these defendants.

Exceptions raised by the private defendants to the complaint challenged, *inter alia*, (i) the breadth of the public use claims as to vast areas of land and waterbottoms of different kinds under different ownership and subject to different legal standards as to ownership and use, (ii) the multiplicity and complexity of issues affecting determination of the public use claims raised by the complaint, (iii) the varied nature of public use high water boundaries and (iv) the lack of standing in plaintiffs as public users to assert a boundary action. The State excepted to the complaint, asserting, among other things, (i) that the Atchafalaya Basin is not one large body of water open to public use, but was occupied by identifiable uplands, swamps, rivers, lakes, bayous, and streams at the time of statehood, including Lake Chetimaches, making public claims to the bed of that "lake" overreaching, and noting that thousands of acres of land were sold by the government and are privately-owned, including swamp and overflowed lands lawfully transferred to the State under the Swamp Land Grant Acts of 1849 and 1850 and then into private ownership to generate funds for levees and drainage to protect the interior lands more suited to development; (ii) that plaintiffs actually seek access for all purposes to these inundated private lands that they have no possessory or proprietary

rights to access, (iii) that they have not stated a justiciable controversy, and (iv) that the State has no duty to sue its own citizens on plaintiffs' behalf over property boundaries which it does not dispute.

Notable for our purposes in the trial court's disposition of the numerous exceptions filed by the private defendants, as well as by the State, the trial court dismissed the State from the action as to all demands against it and dismissed the boundary action against the private defendants. The trial court also granted exceptions of improper cumulation of actions and res judicata[39] by the private defendants, preserving plaintiffs' citizen action under C. C. art. 458 for removal of obstructions to public use as to areas and activities—in properly separated actions—which may be determined to be lawfully open to such uses at trial. The appeal addressed only the dismissal of actions asserted against the State and the dismissal of the boundary action against the private defendants.

The Third Circuit Court of Appeal affirmed the dismissal, finding that the plaintiffs, as public users, have neither cause of action under C.C. arts. 784 *et seq.* and C.C. art. 456, nor right of action under C.C.P. arts 3691 *et seq.* to fix a boundary between water flowing onto private land and the navigable waters of the State of Louisiana which does not establish a boundary between contiguous lands, is affected by fluid stages of high and low water that change daily, is not susceptible to being marked as a traditional boundary is marked, and as to which there is no dispute between the private owners and lessees of the inundated private lands, including stream banks, on the one hand, and the State of Louisiana as owner of the navigable stream and lake beds on the other, as to the line of separation between their contiguous ownership interests. The Court also found that neither the allegations of the petition nor any evidence presented on trial of the exceptions demonstrate that plaintiffs are owners, lessees, usufructuaries or adverse possessors of the lands at issue to vest in them a real and actual legal interest sufficient to support the boundary action asserted by them, rejecting the plaintiffs' argument that "public use" of state-owned waters and waterbottoms is a legally recognizable "usufruct" under Louisiana law.

As to the mandamus action against the State to compel the fixing of such boundaries, the Court of Appeal found that there is no ministerial duty of the State to fix the ambulatory high water boundaries throughout the Atchafalaya Basin which are not required by law, where neither the State nor the owners dispute the ownership boundary between their respective property interests, where plaintiffs' rights to use state lands and navigate over state waterbottoms are not being restricted by State defendants, and where plaintiffs seek a legal remedy not provided by law to

[39] Certain claims as to certain plaintiffs repeated issues previously decided in the *Blanchard* litigation, *supra*.

define precise limits of high water over numerous inundated private lands not under control of the State. As to the declaratory judgment action against the State, the Court of Appeal found that the plaintiffs' action against the State is speculative and theoretical and that, while general statutes exist recognizing rights of access to public waters, plaintiffs have stated no "justiciable controversy," no actual dispute involving the State, but have requested a declaratory judgment on numerous complex issues which are not ripe for adjudication. In this regard, the Court noted that the plaintiffs have "repeatedly asserted overbroad rights of access to the waters of the Atchafalaya Basin" which must be narrowed in the numerous trials which must ensue "to determine which bodies of water are navigable lakes or navigable streams with bank servitudes, which are mud flats or sloughs, which are non-navigable streams, bayous, bays, lakes, lagoons, basins, depressions, flooded swamp, marshland, riparian land, land subject to inland rights, fee ownership, and the issues go on and on."

The Court further stated: "Since plaintiffs cannot seriously ask the court to declare that all waters at issue are state-owned 'running waters' subject to public use at this juncture, the request for declaratory judgment against the State is tantamount to a mandamus action seeking to compel the state to declare rights not adjudicated." The plaintiffs accordingly had no standing to compel the State to make such broad declarations on their behalf. Citing the broad discretion of the courts to determine whether declaratory relief is appropriate to the character of the issues involved and the nature of the relief sought in order to achieve the simple, expedient trial of cases without the usual formalities, the Court also recognized that this case did not fit the standards or purposes of this procedural device.

***Parm v. Shumate*, 2006 U.S. Dist. LEXIS 61227 (W. D. La. Aug. 29, 2006).**

Action by five individuals against the sheriff of East Carroll Parish for a declaratory judgment, injunctive relief, and damages under 42 U.S.C. §1983 and Louisiana state law, alleging that they were arrested without probable cause for fishing and hunting on the waters of the Mississippi River, which covered property of Walker Cottonwood Farms, LLC,[40] including Gassoway Lake, during periodic flooding. The proceeding was initially stayed pending the outcome of the state court litigation entitled *Walker Lands, Inc.. v. East Carroll Parish Police Jury*, *supra*, which sought to enjoin public use of the same water bodies on which the arrests occurred and which determined that Gassoway Lake and the surrounding land, including a drainage ditch and connecting water courses to the Mississippi River (some 3½ miles away) were private

[40] The successor in title to Walker Lands, Inc.

property which was not navigable in fact, although accessible when the Mississippi River floods and subject to public use "for a navigational purpose" as part of the bank of the Mississippi River.

On cross-motions for summary judgment, Magistrate Judge James D. Kirk made recommended findings, *inter alia*, that (i) plaintiffs have both a federal common law right and a state law right to fish and hunt from boats up to the ordinary high water mark of the Mississippi River, regardless of the underlying ownership of the property,[41] (ii) the sheriff did not have probable cause to arrest the plaintiffs for trespass, (iii) the sheriff did not enjoy qualified immunity for his actions, and (iv) plaintiffs were not entitled to enjoin the sheriff from enforcing Louisiana trespass laws. Both parties filed timely objections to the Magistrate's report and recommendations. On review, District Judge Robert G. James adopted the recommended rulings that the sheriff was not entitled to qualified immunity and that plaintiffs were not entitled to enjoin him from enforcing Louisiana trespass laws; however, Judge James rejected the recommendation that plaintiffs have a federal common law right to fish and hunt on private lands flooded by the Mississippi River up to the high water mark, refusing to broadly interpret *Silver Springs Paradise Co. v. Ray*[42]—which had recognized a public right to reasonably use navigable waters "for all legitimate purposes of travel and transportation," whether boating for pleasure or carrying persons or property for hire—to include the right to hunt and fish on navigable waters which periodically flood privately owned lands. Judge James agreed with Magistrate Judge Kirk's finding that the private property in question was subject to public use as part of the bank of the Mississippi River, but concluded that hunting and fishing are not activities incidental to the navigable character of the river and its enjoyment as an avenue of commerce, citing state court decisions rejecting such uses as within the ambit of bank servitude under C.C. art. 456, including *Warner v. Clarke*, *Edmiston v. Wood*, *Buckskin Hunting Club v. Bayard*, and *Walker Lands*, *supra*.[43] Accordingly, Judge James ruled that inasmuch as the Louisiana

---

[41] Magistrate Judge Kirk suggested that there exists a federal common law right of navigation which includes the right to reasonably use the waters of the Mississippi River for navigation, including transportation, commerce, boating, and fishing and hunting from boats, laterally across the entire surface of the river to the high water mark, and that any private ownership of the banks is subject to the superior rights of the government and the public to unhampered use of the water above them for navigation, commerce, or fishing, citing, *inter alia*, *Silver Springs Paradise Co. v. Ray*, *supra*, *State v. Barras*, *supra*, and *D'Albora v. Garcia*, 144 So. 2d 911 (La. App. 4th Cir. 1962), cert. denied, which found that a navigable canal leading to Lake Ponchartrain which was dug by the state as a borrow pit in the construction of a road, and used by the public to access the lake for more than 30 years, was subject to public use for navigation and fishing even if the bed was privately-owned. *See* 2006 U.S. Dist LEXIS 64080 (W.D. La. April 21, 2006).

[42] 50 F. 2d 356 (5th Cir. 1931).

[43] In denying a motion by plaintiffs for reconsideration of his ruling, reported at 2006

Second Circuit, C.C. art. 456, and Louisiana jurisprudence have not allowed fishing or hunting on privately owned banks of navigable rivers because these activities are not incidental to the navigable character of the river and its enjoyment as an avenue of commerce, the sheriff had probable cause to arrest the plaintiffs for trespassing in violation of R.S. 14:63 and granted the sheriff's cross motion for summary judgment seeking dismissal of the case.

This decision is currently on appeal to the United States Court of Appeals for the Fifth Circuit.

***Louisiana Crawfish Producers Association – West, et al v. Amerada Hess Corporation, et al*, 935 So. 2d 380 (La. App. 3rd Cir. 2006), writ denied 943 So. 2d 1094 (La. 2006).**

A commercial crawfishermen's association and over ninety of its members sued eighteen named defendants who were allegedly engaged in oil and gas exploration, dredging and pipeline activities, including the providers of surveying services for such activities. Plaintiffs alleged that the creation of spoil banks and dams in the course of such activities in an area comprising about 58,000 acres within the Lower Atchafalaya Basin (referred to as the "Buffalo Cove Area") impeded the natural flow of water in the area, destroying the aquatic ecosystem and greatly impairing their ability to catch crawfish in the area. The Plaintiffs sought relief under both state tort law and general maritime law for loss of jobs, wages, earning capacity, and recreational enjoyment, as well as inconvenience and mental distress. The trial court dismissed the state law claims on an exception of no cause of action, reserving to them their right to proceed under maritime law. The plaintiffs appealed.

The Third Circuit Court of Appeal noted that the trial court ruling was grounded primarily in the inability of plaintiffs to demonstrate a proprietary interest in either the land of the Buffalo Cove area or the wild crawfish which they sought to catch, citing *Robins Dry Dock & Repair Co. v. Flint*,[44] which denied a plaintiff's recovery for economic loss resulting from physical damage to property in which he had no proprietary interest. On the appeal, plaintiffs argued that they fell within exceptions to *Robins* recognized in federal court decisions like *Maddox v. Interna-*

U.S. Dist. LEXIS 77506 (W.D. La. Oct. 11, 2006), Judge James also noted that (i) *Blanchard, supra*, had declined to find a federal right to fish upon the surface of flooded swamplands lying between two navigable bodies of water, holding that the use of the bed and banks of a waterway, particularly public fishing rights therein, remain purely matters of state law, and (ii) the scope of the bank servitude under C.C. art. 456 does not change depending on whether the bank is dry or covered with water (i.e., the existence of navigable waters flowing over the bank does not affect the permitted uses of the bank—or the limitations thereon—under Louisiana law and jurisprudence).

[44] 275 U.S. 303, 48 S. Ct. 134 (1927).

tional Paper Co.;[45] *Louisiana ex rel. Guste v. M/V TESTBANK*;[46] and *Shaughnessy v. PPG Industries, Inc.*,[47] among others.

The Court of Appeal affirmed the trial court ruling, finding that the exceptions claimed by plaintiffs did not apply as the alleged injuries in the cited cases had occurred in a purely maritime setting to which maritime law was applied or involved the plaintiff's status as a damaged riparian landowner, permitting application of state law duties under C.C. arts. 2315 (general delictual liability) or 656 (prohibiting impediment of the natural flow of surface waters by the owner of the servient estate under the natural servitude of drain). The Court also noted that *Dempster v. Louis Eymard Towing Co., Inc.*,[48] had dismissed the economic damage claims of two fisherman arising from the destruction of a fishing site because they had no proprietary interest in the fish at large in state waters and had no right to claim damages arising from the state's interfering with the exercise of the fishing privilege it granted to them. The Court also cited the Louisiana Supreme Court's rejection of a claim by licensed commercial fishermen under the "taking clause" of the United States Constitution for lost fishing profits in *Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Commission*,[49] in which decision the Court observed:

> The lack of any proprietary interest in the fish in the waters is well-settled, statutorily and judicially. See La.Civ.Code arts 450, 452; La. Rev. Stat. 56:3. In *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1370 (E.D. La. 1978), the court explained that 'fish which are at large in state waters are the property of the state, as public or common things;' that 'an individual has no proprietary interest in the fish he is prevented from catching;' and that 'an individual has no proprietary right to fish commercially in state waters.'

Finally, the Third Circuit rejected the plaintiffs' contention that their fishing licenses placed them in the category of persons holding rights derived from the landowner like the oyster lessees in *Inabnet v. Exxon Corp.*[50] The Court stated that a commercial fishing license is a state-granted privilege subject to such limitations as the state may impose in the exercise of its police power and does not derive from its capacity to lease a particular piece of land as a landowner. It also indicated that any Article 667 duty of good neighborhood under the Civil Code affecting

---

45 47 F. Supp. 829 (W.D. La. 1942).

46 752 F. 2d 1019 (5th Cir. 1985), cert. denied.

47 795 F. Supp. 193 (W.D. La. 1992).

48 503 So. 2d 99 (La. App 5th Cir. 1987), writ denied.

49 715 So. 2d 387 (La. 1998).

50 642 So. 2d 1243 (La. 1994).

activities on lands within the Buffalo Cove area, limiting uses of one's property which cause damage to or deprive a neighbor of the enjoyment his own, does not extend to everyone and does not reach members of the public at large.[51]

III. *Related Public Access Issues*

A. Bed/Bank/Overflow Determinations

The methodology for fixing the limits of ordinary high water and ordinary low water under the bed-bank concept of the Civil Code for navigable rivers and streams has varied over the years (e.g., lay testimony, vegetation mark, averaging of annual water stage data) and is not applied in a mechanical vacuum devoid of the realities of the land-water features and hydrologic regime in which the determination is made.[52] Permeating the methodology chosen is a fundamental reality recognized by Judge Leonard in *Buckskin*,[53] by the Louisiana Supreme Court in *Barras*, by the Louisiana Third Circuit Court of Appeal in *Schoeffler*,[54] and aptly applied by federal courts of appeal in determining the reach of the COE-administered navigational servitude under the Commerce Clause of the United States Constitution:

> The definition of 'ordinary high water mark' advanced by appellants would extend the regulatory jurisdiction of the United States to farmland and hardwood forests in these bottomlands simply because the Tombigbee River periodically floods its banks during the winter and spring wet months. To argue that the government's jurisdiction should extend laterally as much as three miles on either side of the Tombigbee river is ludicrous. Appellant's definition, as the district

---

[51] *See Dumas v. Angus Chemical Co.*, 728 So. 2d 441 at 451 (La. App. 2nd cir. 1999), writ denied.

[52] *Compare*, for example, *Seibert v. Conservation Commission*, 181 La. 237, 159 So. 375 (La. 1935)[relying upon lay testimony in preference to 43 year averaging of the daily low water stage under separate methods employed by the Mississippi River Commission and the State Board of Engineers] and *DeSambourg v. Board of Commissioners*, 621 So. 2d 602 (La. 1993)[relying upon almost a century of Army Corps of Engineers river gauge data]. Both cases dealt with Mississippi River batture determination. The "ordinary high stage of water" used in defining the bank of a navigable river under the Civil Code excludes conditions of temporary overflow. *See* C.C. art. 456, comment (a), and C.C. art 457 (1870) ("The bank of a river is understood to be that which contains it in its ordinary state of high water, "for the nature of the banks does not change, although for some cause they may be overflowed for a time").

[53] "This Court recognizes the difference between the banks of a navigable river and the flood plains of a navigable river, in this case, the Atchafalaya River."

[54] "Our jurisprudence is filled with the problems inherent in surveying a single boundary line that involves a body of water, because water is fluid. Rivers change course, overflow, move their beds, deposit silt, form deltas. Lakes swell for miles, and their beds dry up completely; some are ephemeral, not real lakes, and exist only when another body of water overflows." *See*, e.g., *McDade*, *supra,* and also *Ellerbe v. Grace*, 162 La. 846, 111 So. 185 (1927).

court noted, "would recognize no horizontal limits to the 'bed' of a navigable river in those areas where the banks are relatively low and flat ...' As one federal court of appeals recently noted,

> There must ... be horizontal limits to the 'bed' of a river; otherwise the navigational servitude would extend indefinitely in all directions and swallow up any claim for just compensation under the Fifth Amendment for damages occurring anywhere below the elevation of the high-water mark.[55]

B. Navigability

The navigability of a body of water is never presumed, and the burden of proof in matters of navigability lies with the party seeking to establish navigability.[56] Whether a water body is navigable in law (and, for example, State-owned by right of inherent sovereignty or under long-established public policy against alienation of navigable waterbottoms) depends on whether the water body is navigable in fact (e.g., in 1812[57] or at the time of segregation[58]). Generally, a water body is deemed navigable in fact if the water body in its ordinary state is used or susceptible to being used as a highway of commerce over which trade and travel are or may be conducted by the customary modes of trade and travel on water. The mere fact that small craft could navigate a body of water does not prove navigability, nor is use exclusively by pleasure craft sufficient.[59] As observed at 65 C.J.S. Navigable Waters §3, the legal concept of navigability cannot be determined by a formula which fits every type of stream or water body under all circumstances and at all times. Each determination must rest on the facts and circumstances of the particular case.[60]

---

[55] *See U.S. v Harrell*, 926 F. 2d 1036 at 1043 (11th Cir. 1991). Note, for example, 33 CFR §329.11(a)(1), establishing the "ordinary high water mark" on the shore of non-tidal rivers subject to COE jurisdiction as the line indicated by physical characteristics or "other appropriate means that consider the characteristics of the surrounding areas." Such considerations may include the natural line impressed on the bank, shelving, soil characteristics, vegetation, scour, deposition, gage data, elevation data, historic water flow, and the manipulation of water levels and flows by human intervention.

[56] *Burns v. Crescent Gun & Rod Club*, 41 So. 249 (La. 1906); *McCluskey v. Meraux and Nunez, Inc.*, 186 So. 117 (La. 1939); *State ex rel. Guste v. Two O'Clock Bayou Land Company*, 365 So. 2d 1174 (La. App. 3rd Cir. 1978), writ refused.

[57] The admission of Louisiana to the Union in 1812 vested ownership in the state of the beds of all navigable waters by virtue of its inherent sovereignty.

[58] *See Vermilion Bay Land Company v. Philips Petroleum Co., et al*, 646 So. 2d 408 at 410-412 (La. App. 4 Cir. 1994), writ denied.

[59] *See McCearley v. Lemennier*, 2 So. 649 (La. 1888); *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906)[59]; *St. Mary Parish Land Co. v. State Mineral Board*, 167 So. 2d 509 (La. App. 1st Cir. 1964), writ refused; *Sinclair Oil & Gas v. Delacroix Corp.*, 285 So. 2d 845 (La. App. 4 Cir. 1973); *Dardar v. Lafourche Realty Co., Inc., supra.*

[60] Artificial impacts on navigability should also be considered. *See*, e.g., *Slattery v.*

C. Obstruction[61]

The Attorney General of the State of Louisiana has on several occasions affirmed that a landowner may prohibit others from entering his property to crawfish on overflowed natural bank areas, effected through the various posting laws of the state.[62] So long as it does not embarrass the lawful public uses incident to navigation, posting a private river bank is often legally essential in order to give notice to the passing traveler or public user that prohibited bank and inland activities like hunting and crawfishing are not allowed.[63] Note also in this regard decisions of the Louisiana Supreme Court which have likewise recognized that (i) posting a riverbank may indicate to the passing user that the bank is not available for picnics and campfires and (ii) many lands are burdened with servitudes like the riparian servitude affecting the privately-owned bank of a state-owned navigable stream, but the owner thereof is no less in possession of the affected land, nor does the servitude serve to divest the owner of his title.[64]

D. Private canals, sloughs and drainage channels within private lands

Under Louisiana law, waterways created by acts of man on private property for private purposes, such as canals, whether navigable or not, and natural non-navigable water bodies made navigable through acts of man are private things which are not subject to public use.[65] Moreover, the mere use of public funds in the construction of navigable canals on private property does not create a public right of use of the canal, unless the construction of the canal substantially impairs or destroys the naviga-

---

Arkansas Natural Gas Company, et al, 138 La. 793, 70 So. 806 (1916), involving the recession of waters from a body of water resulting from artificial obstruction of the inlets by the state and federal governments; compare *Amerada Petroleum Corp. v. State Mineral Board*, 14 So. 2d 61 (La. 1943) and *Esso Standard Oil Co. v. Jones*, 98 So. 2d 326 (La. 1957), distinguishing successive and imperceptible changes which have been contributed to by the acts of man; note *Dardar v. Lafourche Realty Co., Inc., supra*, regarding navigational servitudes. Note also *Kaiser Aetna, supra, 100 S. Ct. 383 at 388-389.*

61 C.C. art. 458 (works obstructing the public use); R.S. 14:97 (simple obstruction of a highway of commerce).

62 *See*, e.g., Op. Atty. Gen. 85-333, 88-649, and 01-362; note also 83-680.

63 *See*, e.g., R.S. 14:63 (criminal trespass).

64 *See*, e.g., *Chaney v. State Mineral Board*, 444 So. 2d 105 at 122 (La. 1983); *St. Mary Parish Land Company v. State Mineral Board*, 167 So. 2d 509 at 516 (La. 1964); note also Op. Atty Gen. June 11. 1938, and Op. 85-333, 89-475, 90-512, and 91-195; but note 90-557 .

65 *See* La. C.C. Art. 506 and the official comments thereunder, Art. 450 and Art. 456, comment (f); *Olin Gas Transmission Corp. v. Harrison*, 132 So. 2d 721 (La. App.1961), cert. denied; *National Audubon Society v. White*, 302 So. 2d 660 (La. App. 3rd Cir. 1974), writ denied; *Amigo Enterprises v. Gonzales*, 581 So. 2d 1082 (La. App. 4th Cir. 1991), and *Cenac v. Public Access Water Rights Association, supra,* noting the requirements for an implied dedication to public use.

bility of surrounding natural waterways to such an extent that the new waterway system serves as a substitute for the pre-existing natural system.[66]

Louisiana courts have rejected the suggestion that the public ownership and use of running water includes the right of access for fishing or hunting on running waters which traverse privately owned lands, including canals.[67]

Thus, ordinarily, the mere fact that canals are dug by mineral exploration or pipeline companies under private lease or servitude agreements on privately owned land between existing navigable waterways does nothing to vest a public right of access to or use of the canal absent exceptional circumstances involving public expenditures to construct or maintain the canal and/or its impact on adjacent, public navigable waterways.

For example, in *Buckskin* the defendants attempted to no avail to suggest a use of government funds to maintain a canal by removing fallen trees from the canal after Hurricane Andrew, but made no showing of consent to the arrangement by the affected private landowners. Note also *National Audubon Society v. White, supra* ("We do not feel that the removal of debris from the [McIlhenny] canal by the Army Corps of Engineers following a disaster such as Hurricane Audrey constituted the use of public funds for the maintenance of the canal.") and *Cenac*, discussed within.

In *Vermilion Corp. v. Vaughn, supra*, the Louisiana Supreme Court interpreted the United States Supreme Court decision in *Vaughn v. Vermilion Corp.*,[68] to indicate that a federal law navigation servitude may exist in a private canal if it can be proven that the construction of the artificial waterway *substantially impaired or destroyed* a preexisting natural, navigable waterway, allowing the public to use the artificial waterway as a substitute for the natural one. In *Buckskin*, witnesses affected by the outcome of the action gave opinions as to whether private canals captured the flow of connecting public streams during the period of use by,

---

66 *See State Dept. of Highways v. Jeanerette Lumber & Shingle Co., Ltd.*, 350 So. 2d 847 (La. 1977); *Vermilion Corporation v. Vaughn*, 397 So.2d 490 (La. 1981); *Brown v. Rougon*, 552 So.2d 1052 (La. App. 1st Cir. 1989), writ denied; *Dardar v. Lafourche Realty Co., Inc.*, No. 85-1015 (E.D. La. 1991), affirmed in part, vacated in part and remanded, 985 F. 2d 824 (USCA, 5th Cir. 1993); Op. Atty Gen. No. 93-238.

67 *See Brown v. Rougon, supra*, (recognizing that although subject to public use, the water running naturally in a private canal does not give the public the right to navigate and fish in the canal); *Amigo Enterprises, Inc. v. Gonzales, supra*; *Dardar v. Lafourche Realty Co., Inc., supra*; *People for Open Waters, Inc. v. Estate of Gray*, 643 So.2d 415 (La. App. 3rd Cir. 1994); *Cenac v. Public Access Water Rights Association, supra*; and *Buckskin Hunting Club v. Bayard, supra*; but note *Chaney, supra.*

68 444 U.S. 206, 100 S. Ct. 399, 62 L. Ed. 2d 265 (1979).

and within the knowledge of, such witness, but there was no testimony from a witness possessing scientific competence or special study tied to such matters as the actual origins of the canals, the condition or nature of the affected natural waterways at such time, the effects of artificial conditions in the Basin since that time, including the raising and lowering of water levels in the Basin by the Army Corps of Engineers, on the navigability of specific natural streams claimed to be either destroyed or substantially impaired because of the construction of the canal, among other considerations, which would meet the burden of proof to support a finding that federal law navigation rights burden private ownership interests. Such inquiries are fact specific to each location which must be considered and researched individually to be proven legally whether or not a canal did actually in fact take the course of a bayou. *Buckskin* suggests the need for sufficient proof of such facts, as by Corps of Engineers or competent expert testimony.

Consider also La. R. S. 9:1251, which expressly provides that whenever any landowner voluntarily, whether expressly or tacitly, permits passage through or across his land by the public solely for the purpose of providing a convenience to such persons in the ingress and egress to and from waters for boating, or for the purpose of ingress and egress to and from any recreational site, neither the public nor any person shall thereby acquire a servitude or right of passage, nor shall such passage become a public road by reason of upkeep, maintenance or work performed thereon by any governing authority.

D. The federal navigational servitude under the Commerce Clause of the United States Constitution

The Court in *Buckskin* indicated that even recognition of a federal navigational servitude on navigable waters of the United States regulated by the Army Corps of Engineers under the authority of the Commerce Clause of the U.S. Constitution would provide no basis for recognizing a public right to use private waterways like canals for hunting therefrom or for accessing adjacent private lands for purposes incident to such activity.[69] Consideration should also be given in this regard to jurisprudence indicating that the federal servitude – which gives rise to a right of public use of waterways as continuous *highways* for the purpose of *navigation* in interstate commerce – does not extend to the extraction of goods thereafter transported in commerce.[70]

---

[69] *See also Blanchard* (crawfishing) and *PARM* discussed within.

[70] *See Smith v. Maryland*, 59 U.S. 71, 15 L. Ed. 269 (1855); *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248 (1877) (regarding the authority of Virginia to regulate oyster cultivation in its tidal rivers: "[T]here is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."); *Manchester v. Massachusetts*, 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891); *Douglas v. Seacoast Prod-*

IV. *Conclusion*

As revealed by the foregoing and as recognized by the Rights to Public Access Committee of the Louisiana State Law Institute, the issues affecting claims of public access to water bodies in Louisiana are often numerous and complex, requiring technical scientific analysis, historical cartographic and hydrologic research, and careful legal exegesis of legislation and case precedents to properly identify and apply the law to the issues presented in what is frequently an emotion-charged dispute with cultural and political overtones. Hopefully, recent developments in this area of the law will clarify the some of the confusion and misunderstanding which has characterized so much of the controversy.

ꕥꕥꕥꕥ - ꕥꕥꕥꕥ

---

ucts, Inc., 431 U.S. 265, 97 S. Ct. 1740, 52 L.Ed.2d 304 (1977); note also *Moore v. Hampton Roads Sanitation*, 557 F.2d 1030 (4th Cir. 1976), cert. denied [harvesting of oysters from leases issued by Virginia is a purely local activity subject to Virginia state law, as recognized by Congress in the Submerged Lands Act] and *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984) (the federal navigational servitude under the Commerce Clause does not include public fishing rights, a matter governed by state law); *see* also *Kaiser Aetna* and *Blanchard, supra.*.